STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 13, 2003
v	No. 236376 Oakland Circuit Court
TONY LADELL WILLIAMS DANIELL, Defendant-Appellant.	LC No. 2001-177833-FH

Before: Hoekstra, P.J., and Smolenski and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was found guilty as charged of second-degree home invasion, MCL 750.113a(3), and was sentenced as a fourth-habitual offender, MCL 769.12, to 4 to 15 years' imprisonment, with credit for 126 days served. Defendant appeals as of right. We affirm.

Defendant first argues that the complainant's testimony, that defendant had been violent towards his parents, and the cross-examination testimony of defendant, regarding a personal protection order his parents had obtained against him, constituted impermissible "bad acts" evidence. We disagree.

The decision whether "bad acts" evidence is admissible is within the trial court's discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). Evidence of other crimes, wrongs, or acts of an individual is inadmissible to prove a propensity to commit such acts. MRE 404(b). However, such evidence may be admissible for other purposes under MRE 404(b)(1), which provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

We find that, despite both parties briefing this issue as such, the testimony was not 404(b) evidence; that is, it was not evidence of "other crimes, wrongs, or acts." The prosecution was

not trying to admit the evidence under MRE 404(b) and did not file the appropriate notice. The complainant was merely explaining why, in part, she ended her relationship with defendant. In this context, we believe the evidence was marginally relevant. However, arguable decisions on whether to admit evidence is not an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995).

Similarly, the testimony regarding the personal protection order was not offered as substantive evidence under MRE 404(b), but rather to (1) clarify which jail sentence defendant was referring, and (2) show where defendant obtained money. While the prosecution could have been more careful with its chosen words, so as not to refer to the personal protection order, we do not believe that the trial court abused its discretion in admitting the answers.

In any event, any error was harmless. The prosecution was not seeking the evidence's introduction for its substantive value, i.e., to prove that defendant was violent towards his parents. The jury was never informed of the specific acts of violence defendant allegedly committed against his parents or the particulars of the personal protection order. Also, the personal protection order was only referred to in the prosecutor's questions. Questions by the parties are not evidence, and the jury was so instructed. Jurors are presumed to follow their instructions. Furthermore, the trial court issued a limiting instruction to dispel any prejudice. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant also argues that the testimony of Fred Eckford and Mary Simmons regarding the fact that Drake told them she had broken up with defendant was inadmissible hearsay. We review a trial court's decision whether to admit evidence for an abuse of discretion, but a preliminary issue of law regarding admissibility based upon construction of the Michigan Rules of Evidence is subject to de novo review. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002).

Hearsay is a statement, other than the one made by the declarant while testifying, offered in evidence to prove the truth of the matter asserted, and is generally inadmissible. MRE 801(c); MRE 802. In this case, Drake's statements to Eckford were offered to explain why he refused defendant admittance to Drake's apartment and told him to go away, that he was not welcome there. Evidence which is offered to explain why the listener took the action he did is not hearsay, and is admissible. *People v Fisher*, 449 Mich 441, 449; 537 NW2d 577 (1995). Further, the trial court instructed the jury that the statements were being offered only for this limited purpose and not to consider it substantively.

In regards to Drake's statements to Simmons, the prosecution argued successfully that they were being offered as prior consistent statements. In order for a prior consistent statement to be admissible under MRE 801(d)(1)(B), the following must be established:

> (1) the declarant must testify at trial and be subject to cross-examination, (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony, (3) the prior consistent statement must be consistent with the declarant's challenged in-court testimony, and (4) the prior consistent statement must be made before the time that the alleged motive to falsify arose. [*People v Jones*, 240 Mich App 704, 707; 613 NW2d 411 (2000) (citations omitted).]

Here, the declarant, Drake, did testify at trial that she told defendant the relationship was over and she was subject to cross-examination. Defendant also testified at trial and maintained that Drake did not tell him the relationship was over, thereby implying that Drake was lying. Drake's prior statement to Simmons was made before defendant broke into Drake's apartment, before a possible motive to fabricate arose. However, Simmons only testified that Drake told her that the relationship was over, *not* that that Drake had told defendant that the relationship was over. Therefore, we conclude that the trial court erred in admitting Drake's statements under this rule.

Regardless, we believe that this was harmless error given that three other witnesses testified that Drake had told them that she told defendant the relationship was over. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Accordingly, we hold that there is no error which requires reversal.

Lastly, defendant argues that the court erred in scoring ten points for offense variable 4, psychological injury to the victim. Again, we disagree. A trial court has discretion in determining the number of points to be scored provided there is evidence on the record that adequately supports the particular score. *People v Cain*, 238 Mich App 95, 129-130; 605 NW2d 28 (2000). Offense variable 4 provides that ten points should be scored when serious psychological injury occurs to a victim which requires professional counseling. MCL 777.34(1). The instructions state that ten points should still be scored "if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive." MLC 777.34(2).

Drake testified that she was afraid of defendant and that was part of the reason she ended the relationship, even obtaining a personal protection order against him. Additionally, Drake's victim impact statement noted that she "was terrified of defendant and that she remains in fear for her life." Drake indicated that "she has been a mess since this offense occurred, and that she intends to seek psychological counseling for her fear and anxiety." Drake also contemplated not appearing at defendant's sentencing for fear of being in his presence. Given this evidence, we can not say that the trial court was outside its discretion in scoring ten points for offense variable 4. Therefore, defendant is not entitled to resentencing.

Affirmed.

/s/ Michael R. Smolenski
/s/ Karen M. Fort Hood

I concur in result only.

/s/ Joel P. Hoekstra